Supreme Court, U.S.
FILED

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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

VERNON WHITE,
Petitioner,

vs.

UNION PACIFIC RAILROAD COMPANY,
Respondent.

Petition for Writ of Certiorari to the
Missouri Court of Appeals

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

In an action under the Federal Employers Liability Act (F.E.L.A.), Petitioner obtained a $1.1 Million verdict in his favor and against his railroad employer, Union Pacific Railroad Company. The Missouri Court of Appeals, Eastern District, relying upon evidence favorable to the Employer, and counter to the finding of the jury, ruled that the Employee failed to properly disclose a medical condition, finding that there was no reasonable foreseeability of harm present. This action was in direct contradiction to the holding in *Rogers v. Missouri Pacific Railroad Co.*, 352 U.S. 500, 77 S.Ct. 443, 1 L.Ed. 2d 493 (1957), which holds that an Appellate Court shall not substitute its interpretation of evidentiary facts for a conclusion reached by the jury. *Rogers, Id.* at 504. The Missouri Supreme Court denied transfer.

The questions thereby arising are:

1) Whether a state appellate court may disregard the standard of review in a FELA case as set forth in *Rogers v. Missouri Pacific Railroad Co.*, 352 U.S. 500, 77 S.Ct. 443, 1 L ed. 2d 493 (1957).

2) Whether a state appellate court may substitute its judgment and its interpretation of evidentiary facts in contravention to a conclusion reached by a jury.

LIST OF THE PARTIES

The parties to the proceeding before this court are:

Petitioner: Vernon White

Respondent: Union Pacific Railroad Company.

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The Petitioner, VERNON WHITE, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Missouri Court of Appeals, entered in the above proceeding on December 22, 1993. The Petition for Application for Transfer to the Missouri Supreme Court was denied on March 22, 1994.

OPINIONS BELOW

The Order of the Circuit Court of the City of St. Louis State of Missouri was entered on May 26, 1992 and is reprinted as Appendix A.

The opinion of the Missouri Court of Appeals, Eastern District is reported at 871 S.W.2d 50 (Mo. App., E.D. 1993) and is reprinted as Appendix B.

The order of the Supreme Court of Missouri denying Petitioner's Application for Transfer was entered on March 22, 1994 and is reprinted as Appendix D.

JURISDICTION

The Missouri Appellate Court, Eastern District reversed a jury verdict in favor of Petitioner in a Federal Employers Liability Act (F.E.L.A.), 45 U.S.C. Section 51, et seq. case. In reversing the judgment of the trial court, the Missouri Court of Appeals ignored the standard of review in this court's case of *Rogers v. Missouri Pacific Railroad Co.*, 352 U.S. 500, 77 S.Ct. 443, 1 L. Ed. 2d 493 (1957). *Rogers* reversed a prior Missouri Appellate Court case which committed the same error that the Missouri Appellate Court has now committed.

Jurisdiction is invoked pursuant to 28 U.S.C. Section 1257 and Supreme Court Rule Part 3, Rule 10(l)(c), in that this Petition seeks review of a decision of the highest court of the State of Missouri wherein application for transfer to the Missouri Supreme Court was denied on March 22, 1994. This application was submitted no later than 90 days from the aforesaid date.

Jurisdiction is substantially grounded upon Petitioners claim of denial to a jury determination of the facts and therefore a denial of rights, privileges and immunities granted by the 7th Amendment to the United States Constitution and 45 U.S.C. Section 51, et seq. under the Federal Employer's Liability Act (FELA).

CONSTITUTIONAL PROVISIONS AND STATUTES

Constitutional Provisions:

U.S. Const. amend. VII.

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of common law.

Statutes:

28 U.S.C. Section 1257

45 U.S.C. Section 51, et. seq.

STATEMENT OF THE CASE

This is an action for personal injuries pursuant to the Federal Employer's Liability Act (FELA), 45 USC Section 51 et. sec. In August 1987, while working for Respondent, Union Pacific Railroad Company, Petitioner, Vernon L. White, was injured when he fainted and fell from a platform ladder that was being used to gain access to the roof of a railroad hopper car, which he was assigned to repair.

Petitioner had been recalled to work from furlough as a railroad carman on June 12, 1987. He was required to undergo a return-to-work physical performed by the railroad's physician, Dr. Harold Donell. As part of the physical, he completed a medical history form as required by Respondent. One of the questions which Petitioner was required to answer asked; whether or not "You have ever consulted or been treated by Physicians, Clinics, Healers, or other Practitioners within the last five years?" He answered yes to this question, and he also stated on the form that he had been treated for "vasovagal syncope" (fainting spells) by Dr. Gary Sides, and included Dr. Sides

address on the form. The medical form completed by Petitioner was received by Respondent's medical department on June 13, 1987. In addition, Petitioner had also been hospitalized for the same medical condition while working for Respondent in 1979.

The Union Pacific Rules of Physical Examination make "syncopal episodes" a disqualifying condition for class B employees such as the Petitioner. Nevertheless, the railroad failed to contact Petitioner's treating physician concerning the nature of his medical condition, and returned Petitioner to work without restrictions or recommendations for protective equipment. Moreover, the medical director for the Respondent railroad testified that Petitioner or any employee with such a condition should have been provided a cherry-picker or a cage while performing his duties at heights. Yet, the Respondent failed to do this or take any other preventive measures. As a result, Petitioner incurred severe, permanent and disabling head injuries from the August 1987 accident he suffered while employed by the Respondent.

Petitioner filed suit against Respondent under the FELA in the Circuit Court of St. Louis, Missouri.

Petitioner's theory of his case was that having informed Respondent's physician of his fainting spells during his return-to-work physical, Respondent was given sufficient notice to place the Petitioner on work restrictions or to provide him with the necessary safety equipment, both of which the Respondent failed to do. Petitioner also urged that the very fact that Petitioner was hospitalized for syncopal episodes while working for Respondent in 1979, should have placed the Respondent on reasonable notice of Petitioner's medical condition and his propensity for fainting.

At the close of all evidence, a jury verdict was entered in favor of the Petitioner. However, on May 26, 1992, upon the Respondent's motion, the trial court granted judgment notwith-

standing the verdict on the grounds that Petitioner's theory of recovery was outside the scope of the pleadings. Petitioner then appealed the trial court's ruling to the Missouri Court of Appeals, Eastern District. The court of appeals ruled that Petitioner's theory was within the scope of the pleadings. However, the court of appeals affirmed the trial court's holding on the basis that the Petitioner's evidence did not support a finding of negligence on the part of the Respondent because the railroad did not have sufficient knowledge about the Petitioner's medical condition and his propensity for fainting.

Under the FELA where the jury has returned a verdict for the employee, it must be assumed that the verdict was based on the jury's belief that the employee's injury resulted at least in part from the employer's negligence. *Rogers v. Missouri Pacific Railroad Co.*, 352 U.S. 500, 505, 77 S.Ct. 443, 1 L.Ed.2d 493 (1957). The standard for raising a jury question as to negligence under the FELA is *less* than that required under a normal negligence claim presented to a jury. *Id.*, at 507.

However, the Missouri Court of Appeals held that despite the jury's finding of negligence, Petitioner failed to present sufficient evidence of any reasonable foreseeability of harm present to the Petitioner of which the Respondent should have been aware. The court ruled

> "In the instant case, the only way to establish this foreseeability element was to show that defendant either knew or should have known about plaintiff's medical condition." (Appendix B)

The Court of Appeals noted plaintiff's prior fainting spells:

> The evidence shows that plaintiff had a history of physical ailments. Plaintiff had been hospitalized on three separate occasions for fainting spells and seizures. In 1979, plaintiff was treated by Dr. Lawyer, who recommended that plaintiff not work while his condition was reviewed. In

> 1985, plaintiff was hospitalized, for blacking out, under the supervision of Dr. Sides. In 1986, plaintiff was again hospitalized, for fainting and a possible seizure. Dr. Sides diagnosed plaintiff as having a possible seizure disorder, hypoglycemia or vasovagal syncope. Consequently, Dr. Sides advised plaintiff not to return to work or to place himself in situations would be dangerous as a result of his condition. Dr. Sides never released plaintiff to return to work. (Appendix B)

Nevertheless, in its Opinion, the court stated that

> "Plaintiff's only evidence of foreseeability was his indication that he suffered from vasovagal syncope." (Appendix B).

In so stating the court conceded that Petitioner did put forth evidence of foreseeability! However, the court ruled

> "When asked about this condition, however, plaintiff misrepresented its severity. Given this, and plaintiff's other affirmative misrepresentations about his medical condition, we find that there was no reasonable foreseeability of harm present." (Appendix B).

In so ruling, the court of appeals disregarded the standard of review in a FELA case, weighed the evidence and substituted its judgment for that of the jury's.

Petitioner's motion for rehearing and application for transfer to the Supreme Court of Missouri because of the conflict of the standard of review was denied by the court of appeals on February 3, 1994. Thereafter, Petitioner's direct application to the Supreme Court of Missouri for transfer on the grounds that the opinion conflicted with the standard of review in an FELA case was denied on March 22, 1994.

Petitioner now submits his petition for writ of certiorari to the United States Supreme Court for proper review of his case.

REASONS FOR GRANTING THE WRIT

I. THE MISSOURI COURT OF APPEALS IN SUSTAINING RESPONDENT'S MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT HAS IMPROPERLY RAISED THE STANDARD FOR PROVING NEGLIGENCE IN A FELA ACTION VIOLATING LEGAL PRECEDENT SET IN THE UNITED STATES SUPREME COURT CASE *ROGERS V. MISSOURI PACIFIC RAILROAD CO.*, 352 U.S. 500, 77 S.CT. 443, 1 L.ED.2D 493 (1957).

By affirming the trial court's granting of Respondent's motion for judgment notwithstanding the verdict, the Missouri Court of Appeals has effectively, and without proper authority, raised the standard for proving negligence in an FELA case by a Petitioner.

Rogers v. Missouri Pacific Railroad Co., 352 U.S. 500, 77 S.Ct. 443, 1 L.Ed.2d 493 (1957), is the definitive case for setting forth the proper standards required in an FELA case for proving negligence on the part of an employer, and for also setting forth the grounds on which a case may be taken from a jury. In *Rogers*, the United States Supreme Court reversed the decision of the Supreme Court of Missouri which reversed a judgment entered by the Circuit Court City of St. Louis in favor of a railroad employee under the FELA. The United States Supreme Court held that under the FELA a jury may determine an employers' negligence, played a part, *even the slightest*, in producing an injury and it does not matter that, from the evidence, the jury may also attribute the result to other causes. *Id.* at 506

This court in *Rogers* addressed the very issue which the Missouri Court of Appeals in the present case has failed to properly apply.

> "An employee's action under the Federal Employers' Liability Act (45 USC SECTION 51 et seq) to recover for personal injuries may not be withheld from the jury merely because it appears to the court that the employee's conduct was at least as responsible a cause for his injury as any negligence of the employer." *Rogers*. at 506.

In its opinion, the Missouri Court of Appeals engages in lengthy recitation of the Respondent's evidence for affirming the trial court's holding on Respondent's motion for Judgment Notwithstanding the Verdict. The court of appeals, places strong emphasis on the fact that it was the conduct of the Petitioner which was the major contributing factor responsible for the cause of his injury. The court stressed in its opinion that Petitioner seemed to mislead the Respondent and Respondent's examining physician as to the true nature of his medical condition.

Yet, the court's ruling improperly ignores the fact that Petitioner had both informed his employer on a medical history form that he had been treated for vasovagal syncope angina and that the Respondent had knowledge that Petitioner was hospitalized for that very same condition while working for the Respondent in 1979. In addition, the court improperly ignored the fact that the Union Pacific Rules of Physical Examination makes "syncopal episodes" a disqualifying condition for Class B employees of which the Petitioner was a member. Knowing these facts, the Respondent still failed to provide the Petitioner with the proper protective equipment or the necessary work restrictions.

The court's opinion points to the fact that Petitioner, on his medical history form, denied ever having had "convulsions, spells, fits or epilepsy "or fainting or dizzy spells". (Appendix B). In addition, the court in its holding has relied on the fact that Petitioner allegedly misrepresented the true nature of his medical condition when asked as to its effect on the safe and efficient

performance of his work. (Appendix B). However, the court of appeals has wrongly faulted the Petitioner for not having told the railroad that he had "convulsions, spells, fits, or epilepsy." (Appendix B). The court has failed to recognize that the Petitioner was not diagnosed as having a seizure disorder prior to the accident. The following testimony elicited from by defense counsel reveals:

Q. Dr. McGarry in his report of consultation directed to you dated November 20, 1987, under comment three says and I'll read it exactly, "Anticonvulsant use is inappropriate if the only seizure the patient has had is the seizure immediately following the fall. Risk of recurring seizures in this case would certainly be no greater than the population at large." And I ask this question again. Do you agree or disagree with that statement?

A. As I said, I don't know what the percentage would be. I'm not a neurologist, but if the only seizure the patient had ever had was as a result of trauma, then I would agree with that statement. If the patient had had recurrent or seizures before that time, then I'm not sure that I would agree with that statement that this patient should be on some type of medication.

Q. Are the seizures that you're talking about, the ones that you treated him for, could those be these other seizures that might be taken into consideration.

A. I've not testified that the patient had seizures.

Q. But you said he has a possible seizure disorder.

A. I said the patient has syncope.

(Appendix E).

Further, the neurologist who consulted in Petitioner's treatment had never diagnosed Petitioner as having a seizure disorder. Dr. McGarry testified:

> Q. In your practice, Doctor, have you had patients or their families who have reported occurrences to you and you have considered the history, you have considered the facts and made a determination as to whether that was a true seizure or not?
>
> A. I didn't think that was a seizure at that time.

(Appendix E)

Petitioner had not had seizures, according to his doctors, so the correct answer to the question on his medical history form was "no". Viewing the evidence in the light most favorable to the Petitioner, Petitioner did not misrepresent his condition but rather supplied the specific diagnosis that was given to him.

The court in its opinion also states that "Petitioner's only evidence of foreseeability was Respondent's indication that he suffered from vasovagal syncope" (Appendix B), thus conceding that Petitioner did present some evidence of foreseeability. By placing such heavy emphasis on Respondent's evidence, the court has ignored the holding in *Rogers*, and has allowed Petitioner's case to be taken from the jury despite the presence of evidence of foreseeability supporting the jury's verdict in Petitioner's favor.

In an FELA case, the test for a jury case in an action to recover for personal injuries is whether the proofs sufficiently justify that the employer's negligence played *even the slightest* part in producing the injury for which damages are sought. *Rogers* at 506. When this test is met the judge must find that a jury case exists despite that, from the evidence, the jury might also on the grounds of probability, attribute the result to other causes, including fault arising from an employee's actions. *Id.* The

standard for raising a jury question as to the negligence of an employer under the FELA is *less* than that of a normal negligence claim presented to a jury. *Rogers* at 507. Although federal courts do not apply the "scintilla rule" that any evidence supporting a negligence claim raises a case for the jury, federal courts have applied a standard similar to the "scintilla rule" to FELA cases. *Mendoza v. Southern Pacific Transportation Co.*, 733 F.2d 631, 633 (9th Cir., 1984).

The Missouri Court of Appeals, in its opinion, even cites to *Mendoza* which states that a motion for directed verdict or judgment notwithstanding the verdict should not be granted in a FELA case if there is *any evidence* of employer negligence. (Appendix B). The court also acknowledges that Petitioner did, in fact, list on the Respondent's return-to-work Medical History Form that he had been treated for vasovagal syncope, the same condition which resulted in his August 1987 accident. (Appendix B). Yet, the court somehow still found a way to misapply the correct standard, stating that there was no showing of the Respondent's negligence or of foreseeability to the Respondent of Petitioner's medical condition. (Appendix B).

Petitioner concedes that with the evidence presented at the trial court level a result in favor of the Respondent quite possibly could have been reached by the jury. However, Petitioner asserts that in the present case, in the eyes of the jury, there was sufficient evidence in Petitioner's case for the jury to render its verdict in Petitioner's favor.

Rogers and a line of other federal cases have indicated that FELA cases require less proof than that of ordinary negligence actions. These cases also indicate that a jury verdict in favor of an employee shall remain unaffected by a reviewing court, unless to so hold would be entirely against the weight of the evidence. With the facts as stated, supported by the current legal precedent, the jury's conclusion at the trial court level would not

be outside the possibility of reason on the facts and circumstances shown in the present case. Thus, the jury's verdict should have been left unaffected by the trial court, and the Respondent's motion for judgment notwithstanding the verdict denied.

Reviewing the evidence in the light most favorable to the Petitioner, the jury concluded that the railroad was negligent in producing the injury to Petitioner.

Petitioner urges that by reversing the jury's verdict in favor of Petitioner, the trial court and the Missouri Court of Appeals have ignored legal precedent set by the United States Supreme Court and followed by Federal Circuit Courts throughout the country. To uphold the state appellate court's ruling would be an injustice to the Petitioner, in face of the evidence at hand, but it would also make this court's ruling in *Rogers* moot, setting forth a new and unfair standard to be met by a Petitioner for proving negligence in a FELA case.

II. BY REWEIGHING AND CONSIDERING THE EVIDENCE OF THE RESPONDENT THE MISSOURI COURT OF APPEALS HAS IGNORED AND FAILED TO APPLY THE CORRECT STANDARD OF REVIEW IN AN FELA ACTION.

The court, in ruling that Petitioner failed to make a submissible case that the railroad either knew or should have known of the Petitioner's medical condition, ignored significant material facts and evidence established at the trial which clearly showed that the railroad had reasonable notice as to Petitioner's medical condition. And by so doing, the Court of Appeals has committed gross error by failing to apply the proper standard of review in an FELA case.

As to a disputed fact, the jury, not a reviewing court, is in the best position to make a factual determination. *Rogers v. Missouri*

Pacific Railroad Co., 352 U.S. 500, 1 L.Ed.2d 493, 77 S.Ct. 443, (1957). The Missouri Court of Appeals has held, in an FELA case, the court must "view the evidence and reasonable inferences in a light most favorable to the Petitioner and disregard Respondent's contrary evidence." *Anderson v. Burlington Northern Railroad Co.*, 700 S.W.2d 469, 472 (Mo. App. 1985).

The Missouri Court of Appeals has based its finding against Petitioner by relying almost entirely upon the Respondent's evidence in the record pertaining to the alleged misrepresentations on the part of the Petitioner. In its opinion the Court of Appeals stated "that Plaintiff's only evidence of foreseeability was Plaintiff's indication that he suffered from vasovagal syncope." (Appendix B) In so stating the Court of Appeals conceded that the Petitioner did put on evidence of foreseeability.

However, the Court of Appeals in the instant case did not end its inquiry upon finding in the record that Petitioner informed the Respondent railroad that he was being treated by Dr. Gary Sides for vasovagal syncope on his medical history form for his return to work physical. Instead, the Court of Appeals proceeded to weigh the evidence and determine that when questioned about his vasovagal syncope angina "plaintiff misrepresented its severity." That was added to the "plaintiff's other affirmative misrepresentations about his medical condition" to lead the court to "find that there was no reasonable foreseeability of harm present." (Appendix B)

The Missouri Court of Appeals ignored the written notification of Petitioner's medical condition that was provided to the Respondent's examining physician, Dr. Harold Donnell, by the Petitioner. The court has also ignored the very fact that Petitioner, while he was employed by the Respondent was hospitalized from work for the very same medical condition in 1979.

The Court of Appeals then went on to ignore the correct standard of review in FELA cases as set forth by Federal caselaw.

In a FELA action, a reviewing court should be reluctant in substituting its judgment for that of the jury with regard to a jury verdict that is favorable to an injured employee. *Borough v. Duluth, Missabe & Iron Range Railway Co.*, 762 F.2d 66, 70 (8th Cir. 1985). In reviewing a lower court's ruling on a Respondent's motion for judgment notwithstanding the verdict the reviewing court is not free to weigh the evidence, pass on the credibility of witnesses or substitute its judgment for that of the jury. *Ybarra v. Burlington Northern, Inc.* 689 F.2d 147, 150 (8th Cir. 1982).

By its consideration of the Respondent's evidence, the Court of Appeals is essentially reweighing the evidence, drawing inferences and substituting its judgment for that reached by the jury. In its consideration of this evidence, the court has failed to properly follow its own standard, the standard in Federal court and the standard set by the United States Supreme Court.

Through its holding the Missouri Court of Appeals has usurped a role which has been traditionally empowered upon the jury, since it has, in effect, substituted its own judgment for that of the jury's. The court without proper authority has effectively overruled the United States Supreme Court in *Rogers*, and has displaced various prior holdings in Federal and Missouri caselaw as to the standard of review in an FELA claim.

III. THE UNITED STATES SUPREME COURT IS VIGILANT TO EXERCISE ITS POWER OF REVIEW IN ANY FELA CASE WHERE IT APPEARS THAT THE LITIGANTS HAVE BEEN IMPROPERLY DEPRIVED OF THEIR RIGHT TO A JURY DETERMINATION.

In the present case, the Missouri Court of Appeals has effectively eliminated the traditional role of a jury in an FELA case. The court has unjustly failed to uphold a jury verdict supported by sufficient factual evidence. In addition, the court has without proper discretion replaced its judgment for that of the jury's.

Congress enacted the FELA statute with the intent of leaving the fact-finding function of whether the employer's fault played any part in the employee's injury to the jury. *Rogers* at 509. Cognizant of the duty to effectuate the intention of congress to secure the right to a jury determination in an FELA action, the United States Supreme Court is vigilant to exercise its powers of review by granting certiorari in any case where it appears that the litigants have been denied of this determination. *Id.*

As prior facts indicate, Petitioner presented sufficient evidence in the eyes of the trial jury for them to render a verdict in favor of the Petitioner. The court of appeals through its holding has grossly failed to effectuate congressional intent of the FELA statute as interpreted by this court in *Rogers*. By failing to uphold the jury's finding in direct contravention of the weight of the evidence, the court of appeals has denied the Petitioner its right to a jury determination under the FELA statute.

CONCLUSION

This petition presents another instance where the Missouri Courts have failed to apply the correct standard for proving an employer's negligence and the correct standard of review in an FELA action.

Under *Rogers* and similar circumstances, the United States Supreme Court has reversed the judgment of a Missouri Appellate Court, reversing a judgment entered on a jury's finding in favor of a railroad employee, in an action for negligence by the employee under the FELA, where proofs with reason supported a jury's conclusion that the employer's negligence played a part in producing the employee's injury. *Honeycutt v. Wabash Railway Co.*, 355 U.S. 424, 2 L.Ed.2d 380, 78 S.Ct. 393 (1958). In *Honeycutt*, the United States Supreme Court also granted a petition for certiorari on the part of a railroad employee, when a judgment entered in his favor by the Circuit Court of the City of St. Louis, was reversed by the St. Louis Court of Appeals.

This Court must once again grant certiorari as it did in *Rogers* and *Honeycutt* in order to institute the correct standards required in an FELA action which the Missouri courts have once again failed to properly apply in the present action.

It is for the foregoing reasons, the Petitioner asks this court to follow its decisions in *Rogers* and *Honeycutt*, and reverse the decision of the trial court and the Missouri Court of Appeals, Eastern District since both have committed gross errors in misapplying the proper standards in an F.E.L.A. action.

Respectfully submitted,

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APPENDIX

APPENDIX A

IN THE CIRCUIT COURT OF THE CITY OF ST. LOUIS
STATE OF MISSOURI

No. 882-07185
Division No. 11

VERNON L. WHITE,
Plaintiff,

v.

UNION PACIFIC RAILROAD COMPANY,
Defendant.

RULING ON POST-TRIAL MOTION

[Filed: May 26, 1992]

I.

Defendant's Motion for Judgment Notwithstanding the Verdict is GRANTED on the grounds that the evidence does not support any of the allegations of negligence contained in plaintiff's petition and, therefore, plaintiff has not made a prima facia case.

II.

This Court has reviewed defendant's motion for a new trial to determine whether it should be granted in the event that the judgment notwithstanding the verdict is hereafter vacated or reversed [Rule 72.01(c)(1)].

1. The Court finds that it prejudicially erred in overruling defendant's objection and allowing plaintiff's counsel to refer in closing argument to high salaries paid certain baseball players. *Faught v. Washam,* 329 S.W.2d 588, 601 (Mo. 1959).

2. The Court finds that it prejudicially erred in allowing plaintiff to introduce evidence over defendant's objection relat-

ing to the issue of negligent assignment in that that issue was not specifically pled, nor does it fall within any of the allegations of negligence that were pled.

3. The Court finds that it prejudicially erred in allowing plaintiff, over defendant's objection to argue matters not in evidence concerning, companies that have gone out of business and the thousands of people standing in line for a few jobs.

4. The Court finds that it prejudicially erred in allowing the jury, during its deliberations, to review Dr. Grossman's chart (Plaintiff's Exhibit 4) of alleged past and future wage loss which included an hourly rate of $14.13 for plaintiff, in that there was no evidence that plaintiff was earning at that rate at the time of the incident.

5. The Court finds that it prejudicially erred in giving Instruction 8, plaintiff's verdict directing instruction on the grounds that the elements submitted were not supported by substantial evidence.

WHEREFORE, it is the order of this Court that the Verdict of the jury entered February 13, 1992 is hereby set aside and judgment is entered in favor of the defendant Union Pacific Railroad. In the event that the judgment notwithstanding the verdict is hereafter vacated or reversed, the defendant is granted a new trial on all issues.

SO ORDERED:

/s/ Edward M. Peek
Edward M. Peek
Circuit Judge

Dated: 5/26/92

cc: Attorneys of Record

APPENDIX B

IN THE MISSOURI COURT OF APPEALS
EASTERN DISTRICT
DIVISION FOUR

No. 62204

VERNON WHITE,
Appellant,

vs.

UNION PACIFIC RAILROAD COMPANY,
Defendant.

Appeal from the Circuit Court of the City of St. Louis

Hon. Edward M. Peek

OPINION FILED: December 28, 1993

This is an action for personal injuries pursuant to the Federal Employer's Liability Act (FELA). Plaintiff appeals from the trial court's granting defendant's motion for judgment notwithstanding the verdict and entering judgment in favor of defendant. We affirm.

Plaintiff worked as a carman for Union Pacific Railroad Company (formerly Missouri Pacific Railroad Company). Prior to June 12, 1987, plaintiff had been on furlough for several years. Before being allowed to return to work, plaintiff was required by Union Pacific to undergo a physical examination. After being cleared, plaintiff resumed his duties as a carman. It was during the commission of these duties that plaintiff sustained the injuries which are the subject of his FELA action.

Plaintiff's physical examination was performed by Dr. Harold Donnell. To aid Dr. Donnell in the examination process, plaintiff completed a Medical History form. This form asked the patient:

"Have you ever had, or do you now have?" The patient then is to check either the "YES" box or the "NO" box to indicate his history with regard to each particular ailment listed. One question was "Have you consulted or been treated by Physicians, Clinics, Healers, or other Practitioners within the last five years? If yes give name and address of doctor, hospital, clinic, and details." In response, plaintiff answered yes and in the space provided listed Dr. Gary W. Sides, D.O., and the doctor's address. In addition, plaintiff wrote "vasovagal syncope angina" beneath the doctor's name and address. In response to other conditions listed on the form, plaintiff indicated that he had never had and did not then have "convulsions, spells, fits or epilepsy" or "fainting or dizzy spells." Plaintiff also indicated that he did not have any physical, mental or emotional condition which might in any way interfere with his safety or the efficient performance of his work. Plaintiff further indicated that he should not be assigned any work restrictions.

Defendant's Medical Director, Dr. Bevilacqua, testified that the physicians who perform the return-to-work physical examinations rely on the accuracy of the responses on the Medical History form. In his deposition, Dr. Donnell testified that he had relied upon plaintiff's Medical History form in reaching his opinions and conclusions. Dr. Donnell further testified that he asked plaintiff about his reference to vasovagal syncope on the form, and plaintiff responded that it was a single episode of fainting. This testimony was uncontradicted. According to Union Pacific Rules of Physical Examination, an employee was not subject to work restrictions due to a single fainting incident. Dr. Donnell concluded that plaintiff met the requirements for returning to his job.

The final decision of returning plaintiff to his job without any work restrictions was made by Dr. Bevilacqua and Dr. Richling, the assistant medical director. Their decision was based on Dr. Donnell's report and on the information which plaintiff provided

to Dr. Donnell. The evidence indicates that except for the reference to vasovagal syncope and plaintiff's explaining it as a single fainting episode, plaintiff did not advise Dr. Donnell or any other Union Pacific employee of his medical condition or his need for work restrictions.

The evidence shows that plaintiff had a history of physical ailments. Plaintiff had been hospitalized on three separate occasions for fainting spells and seizures. In 1979, plaintiff was treated by Dr. Lawyer, who recommended that plaintiff not work while his condition was reviewed. In 1985, plaintiff was hospitalized, for blacking out, under the supervision of Dr. Sides. In 1986, plaintiff was again hospitalized, for fainting and a possible seizure. Dr. Sides diagnosed plaintiff as having a possible seizure disorder, hypoglycemia or vasovagal syncope. Consequently, Dr. Sides advised plaintiff not to return to work or to place himself in situations would be dangerous as a result of his condition. Dr. Sides never released plaintiff to return to work.

Plaintiff, after his physical examination, was cleared by Union Pacific to return to work. On August 26, 1987, plaintiff was assigned by his supervisor to repair the roof of a covered hopper car. In order to do so, plaintiff used a portable platform ladder. Plaintiff's injuries were sustained when he fell from the ladder. The accident occurred in connection with his work assignment.

The facts surrounding the accident are unclear because there were no eyewitnesses. Plaintiff's accounts of the events are varied. In the accident report he prepared, plaintiff claimed that he lost his balance as he was stepping from the platform to the ladder. He also stated in the report that he did not know whether the working conditions or equipment caused the accident. Two weeks after the accident, plaintiff told his treating physician that as he was stepping from the platform ladder to the railroad car ladder, bolts and washers began to spill from his pockets. When he tried to catch the falling washers, he lost his balance and fell

to the ground. At trial, plaintiff testified that as he was climbing up the platform ladder, he began to feel dizzy and cold and blacked out. Plaintiff's co-workers testified that following the fall, plaintiff was having convulsions and beating his head on the floor. Plaintiff was treated for head injuries.

Plaintiff's first point on appeal is the trial court erred in granting defendant's judgment notwithstanding the verdict. We find this point dispositive of the appeal. The trial court found that the evidence did not support a finding of negligence. Plaintiff argues that there was evidence that defendant failed to provide plaintiff with suitable equipment when defendant knew or should have known that plaintiff was prone to blackout spells prior to plaintiff's accident. We disagree.

A motion for judgment notwithstanding the verdict presents the issue of whether the plaintiff made a submissible case. *Jambrozik v. M.T. Realty and Inv. Corp.*, 843 S.W.2d 394, 395 (Mo. App. 1992). Therefore, we review the evidence in the light most favorable to the plaintiff and accord him all reasonable beneficial inferences which can be drawn from it. *Id.* The granting of judgment notwithstanding the verdict is proper only if reasonable minds could not differ. *Glover v. Atchison, Topeka, & Santa Fe Ry.*, 841 S.W.2d 211, 212 (Mo. App. 1992).

Plaintiff's petition alleged that defendant was negligent in the following ways:

> "(a) failed to provide a reasonable safe place in which to work;
>
> (b) failed to provide plaintiff with proper, safe and adequate equipment with which he could perform his duties;
>
> (c) failed to provide plaintiff with proper scaffolding suitable for access to his designated work area in order to safely perform his duties:

(d) failed to make parts and materials necessary in the performance of his job and personal safety accessible."

Although plaintiff does not specifically allege negligent assignment in his petition, the trial court found, in denying defendant's motion for a directed verdict, that the above allegations sufficiently pled negligent assignment. The trial court framed the issue on trial as: "[plaintiff's] position is not that the ladder was defective in that it had a loose rung or the railing was not sufficient, or something, but it is whether or not it was the proper type of equipment for a person such as [plaintiff] to be provided if, in fact, the railroad knew about his propensity for fainting."

In order to establish a submissible case under the Federal Employer's Liability Act, the plaintiff must show that the railroad had a duty to provide him with a reasonably safe place to work, that the railroad breached its duty of care, that this lack of due care played some part, however slight, in producing the plaintiff's injury and that the injury was reasonably foreseeable. *Stewart v. Alton and Southern Ry. Co.*, 849 S.W.2d 119, 124 (Mo. App. 1993). In a negligent assignment case, the employee must show that defendant knew or should have known that its assignment exposed the employee to an unreasonable risk or harm. *Fletcher v. Union Pac. R. Co.*, 621 F.2d 902, 909 (1980). In the instant case, the only way to establish this foreseeability element was to show that defendant either knew or should have know about plaintiff's medical condition.

Plaintiff argues that defendant knew or should have known about plaintiff's medical history because on the Medical History form, plaintiff indicated he suffered from vasovagal syncope and listed Dr. Gary Sides as his treating physician. It is plaintiff's position that this evidence is sufficient to create a jury question on the issue of negligence. Plaintiff claims that as a matter of federal substantive law, a motion for a directed verdict or

judgment notwithstanding the verdict may not be granted in a FELA case if there is any evidence of employer negligence. *Mendoza v. Southern Pacific Trans. Co.*, 733 F.2d 631, 633 (9th Cir. 1984).

Even when viewed in the light most favorable to plaintiff, the evidence shows that plaintiff repeatedly misrepresented his medical condition to defendant. On the same return-to-work Medical History form which plaintiff listed vasovagal syncope and Dr. Sides, he specifically denied every having had "convulsions, spells, fits or epilepsy" or "fainting or dizzy spells". In addition, plaintiff stated that he had no physical condition which would interfere with the safe and efficient performance of his work and suggested he be assigned no work restrictions. Most significant of all, it was Dr. Donnell's uncontradicted testimony that he specifically questioned plaintiff about the vasovagal syncope listed on the Medical History form. Plaintiff stated that it was a single fainting episode. Plaintiff made these representations despite his true medical history, which included several blackouts, convulsions, hospitalization and a doctor's advice not to return to work where he would be placed in a dangerous position.

If the jury's decision is reasonably supported by the record in a FELA case, it should be allowed to stand. *Tennant v. Peoria & P.U. Ry.*, 321 U.S. 29, 32-35, 64 S.Ct. 409, 411-412, 88 L.Ed. 520 (1944). "Judicial appraisal of the proofs to determine whether a jury question is presented is narrowly limited to the single inquiry whether, with reason, the conclusion may be drawn that negligence of the employer played any part at all in the inquiry." *Stewart*, 849 S.W.2d at 123 (quoting *Sinkler v. Missouri Pacific Railroad Co.*, 356 U.S. 326, 329, 78 S.Ct. 758, 762, 2 L.Ed.2d 799 (1958)). If there is no showing of employer's negligence, nor any reasonable foreseeability of harm present, the issue may be taken from the jury. *Glover*, 841 S.W.2d at 213.

In the case at bar, we find the jury's decision was not reasonably supported by the record. Plaintiff's only evidence of foreseeability was his indication that he suffered from vasovagal syncope. When asked about this condition, however, plaintiff misrepresented its severity. Given this, and plaintiff's other affirmative misrepresentations about his medical condition, we find that there was no reasonable foreseeability of harm present. In addition, the allegation that defendant failed to provide plaintiff reasonably safe appliances with which to do his job is not supported by the record. There was absolutely no evidence that the ladder from which plaintiff fell was defective. Therefore, the trial court did not err in granting defendant's motion for judgment notwithstanding the verdict.

The judgment is affirmed

/s/ Clifford H. Ahrens
CLIFFORD H. AHRENS, Judge

Stanley A. Grimm, P.J., and Carl R. Gaertner, J. concur.

APPENDIX C

IN THE MISSOURI SUPREME COURT

No. 62204

VERNON WHITE,
Plaintiff-Appellant,

vs.

UNION PACIFIC RAILROAD CO.,
Defendant-Respondent.

Appeal from the Circuit Court of the City of St. Louis

PLAINTIFF-APPELLANT'S APPLICATION FOR TRANSFER TO THE MISSOURI SUPREME COURT

COMES HOW Plaintiff-Appellant, Vernon White, by the through his undersigned counsel, Rosen & Associates, P.C., and pursuant to Rule 83.03 of the Missouri Rules of Civil Procedure, and prays this Court to transfer the Opinion of the Missouri Court of Appeals, Eastern District, Division IV, entered December 28, 1993, affirming the Circuit Court's Order granting Defendant-Respondent's Motion for JNOV. In support of this Application, Plaintiff-Appellant states as follows:

1. This application presents questions of general interest and importance inasmuch as the Court of Appeals in its Opinion filed on December 28, 1993, modified the Standard of Review applied to F.E.L.A. cases overruling *sub silentio Hertzler v. Burlington Northern Railroad Co.*, 720 S.W.2d 762, 766 (Mo. App. 1986) and *Anderson v. Burlington Northern Railroad Co.*, 700 S.W. 469, 472 (Mo. App. 1985 by:

A. Stating that the standard of review requires the court, when reviewing an order granting a motion for judgment notwithstanding the verdict, to "review the evidence in the light most favorable to the plaintiff and

accord him all reasonable beneficial inferences which can be drawn from it" (Opinion p. 5), but omitting the requirement that the court "disregard defendant's contrary evidence". *Anderson, supra* at 472. The court also omitted the requirement that the court must not reweigh the evidence. *Hertzler, supra* at 766.

B. Citing and incorporating defendant's contrary evidence into its opinion while ignoring plaintiff's evidence.

C. By reweighing the evidence and drawing inferences that were different than those reached by the jury.

WHEREFORE, Plaintiff-Appellant prays this Court to enter its order granting his application to transfer to the Missouri Supreme Court.

Respectfully submitted,

ROSEN, SANDERSON & ROSE

BY /s/ Melinda Sanderson
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APPENDIX D

IN THE SUPREME COURT OF MISSOURI

No. 76688
E.D. No. 62204

January Session, 1994

Vernon White,
Appellant,
vs. (TRANSFER)
Union Pacific Railroad Company,
Respondent.

Now at this day, on consideration of appellant's application to transfer the above-entitled cause from the Eastern District Court of Appeals, it is ordered that the said application be, and is the same hereby denied.

STATE OF MISSOURI-Sct.

I THOMAS F. SIMON, Clerk of the Supreme Court of the State of Missouri, certify that the foregoing is a full, true and complete transcript of the judgment of said Supreme Court, entered of record at the January Session thereof, 1994, and on the 22nd day of March, 1994, in the above-entitled cause

Given under my hand and seal
of said Court, at the City
of Jefferson, this 22nd day
of March, 1994

/s/ Thomas F. Simon, Clerk

APPENDIX E

IN THE MISSOURI COURT OF APPEALS
EASTERN DISTRICT

Appeal No. 62204

VERNON WHITE,
Appellant,

vs.

UNION PACIFIC RAILROAD,
Respondent.

IN THE CIRCUIT COURT OF MISSOURI
ST. LOUIS CITY, 22ND JUDICIAL CIRCUIT
Honorable Edward Peek, Judge

Cause No. 882-07185

VERNON WHITE,
Plaintiff,

vs.

UNION PACIFIC RAILROAD,
Defendant.

RECORD ON APPEAL
TRANSCRIPT
VOLUME 1

APPEARANCES

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* * *

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Q. Okay. And you were confident that he was getting appropriate care from the other providers?

A. Yes.

Q. All right. Mr. Williams described an incident that was described to you prior to the 1986 hospitalization where the man was rolling his head and I wrote it down but I'm not sure I — and he jerked his legs.

A. Yes.

Q. In your practice, Doctor, have you had patients or their families who have reported occurrences to you and you have considered the history, you have considered the facts and made a determination as to whether that was a true seizure or not?

A. I didn't think that was a seizure at that time.

Q. All right. And that is a determination that you have to make.

A. Yes.

Q. And that's a very serious diagnosis for a patient.

A. Yes.

Q. When you diagnose a patient as being epileptic or having seizures in the past, then that patient carries with them — I don't want to say a stigma, but they carry with them a very definite diagnosis for the rest of their life?

A. Yes, and also some other obligations like not * * *

* * * **[300]** not misstating something or you're not hearing me correctly. Dr. McGarry in his report of consultation directed to you dated November 20, 1987, under comment three says and I'll read it exactly. "Anticonvulsant use is inappropriate if the only seizure the patient has had is the seizure immediately following the fall. Risk of recurring seizures in this case would certainly be no more than 1 or 2 percent, which would be almost similar to the population at large." And I ask this question again. Do you agree or disagree with that statement?

A. As I said, I don't know what the percentage would be. I'm not a neurologist, but if the only seizure the patient had ever was a result of trauma, then I would agree with that statement. If the patient had had recurrent or seizures before that time, then I'm not sure that I would agree with that statement that this patient should be on some type of medication.

Q. Are the seizures that you're talking about, the ones that you treated him for, could those be these other seizures that might be taken into consideration?

A. I've not testified that the patient had seizures.

Q. But you said he has a possible seizure disorder?

A. I said the patient has syncope.

Q. And a possible seizure disorder?

A. On the second admission, yes, I said the patient * * *